Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

HAMILTON AMUSEMENT CENTER t/a VIDEO EXPRESS,
L.O.J., INC. t/a THE EMPORIUM,
PINCO, INC. t/a CAMELOT BOOK STORE, and
CRESCENDO BOOKS, INC. t/a CARNIVAL BOOKS,

Petitioners,

vs.

PETER VERNIERO, Attorney General for the State of New Jersey
and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

LIPSITZ, GREEN, FAHRINGER, ROLL,
SALISBURY & CAMBRIA, LLP
Paul J. Cambria, Jr., Esq.
Counsel of Record
Attorneys for Petitioners
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3857
(716) 849-1333

Of Counsel:
Barry Nelson Covert, Esq.
William M. Feigenbaum, Esq.

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(B-1475)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

QUESTIONS PRESENTED

1. Whether a New Jersey statute which limits only sexually oriented businesses to two exterior signs, one sign excluding minors and the other an identification sign no larger than 40 square feet in size, is a content-based restriction invalid under strict scrutiny analysis?

2. Whether a New Jersey statute restricting the number and content of exterior signs on sexually oriented businesses may be sustained as content-neutral where there was no factual basis shown for a substantial governmental interest in the restriction before the state legislature or the trial court, and the legislative history of a "related" statute was first introduced on appeal?

3. Whether, if the New Jersey statute restricts only petitioners' commercial speech, it should be analyzed under this Court's intermediate scrutiny test?

4. Whether, if the New Jersey statute is analyzed under the intermediate scrutiny test, the state has met its burden of proving on the record that its interests in regulating petitioners' commercial speech are substantial; that the statute advances those interests in a direct and material way; and that the restrictions are reasonable under the circumstances?

5. Whether the New Jersey statute as interpreted by the State appellate courts to allow one "identification" sign upon sexually oriented businesses, which may relate information pertaining to the "general notion of the business in order to identify the business," is unconstitutionally vague.

PARENT AND SUBSIDIARY COMPANIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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OPINIONS AND ORDERS BELOW

On October 27, 1995, the Superior Court of New Jersey, Law Division-Mercer County, issued an Amended Opinion holding that New Jersey Statutes Annotated section 2C:34-7c, amending New Jersey Statutes Annotated 2C:34-2.3c, was unconstitutional; enforcement of the statute was to be permanently enjoined. That decision has not been reported, but is reproduced in the Appendix at pages A-83 to A-102. On December 19, 1995, that court issues its final judgment declaring that New Jersey Statutes Annotated 2C:34-2.3c was unconstitutional and permanently enjoined its enforcement. That judgment is reproduced in the Appendix at pages A-80 to A-82.

On February 28, 1997, the Supreme Court of New Jersey, Appellate Division, issued an Opinion reversing the Law Division, holding that New Jersey Statutes Annotated 2C:34-7c was a valid regulation of commercial speech; the lower court's permanent injunction was vacated. That Opinion has been reported at 298 N.J. Super. 230, 689A.2d 201, and is reproduced in the Appendix at pages A-64 to A-82, infra.

On July 21, 1998, the Supreme Court of New Jersey issued an Opinion affirming the Opinion of the Appellate Division, and upholding the constitutionality of New Jersey Statutes Annotated 2C:34-7c. That Opinion is reported at

156 N.J. 254, 716 A.2d 1137, and is reproduced in the Appendix at pages A-2 to A-63, infra.

On October 7, 1998, the Supreme Court of New Jersey filed an Order denying petitioners' motion for reconsideration of its Opinion of July 21, 1998. That Order is reproduced in the Appendix at page A-1, infra.

JURISDICTION OF THIS COURT

The Order of the Supreme Court of New Jersey denying petitioners' motion for reconsideration of the Opinion of that court was filed on October 7, 1998 (A-1). Jurisdiction of United States Supreme Court is invoked pursuant to 28 U.S.C. §1257(a) and Rule 13 of the Rules of this Court, as a final judgment reviewed by the highest court of New Jersey in which review could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

New Jersey Constitution, Article I, paragraph 6

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

New Jersey Statutes Annotated [hereinafter "N.J.S.A."] section 2C:34-7c

> No sexually oriented business shall display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size.

N.J.S.A. section 2C:34-7d

> A person who violates this section is guilty of a crime of the fourth degree.

STATEMENT OF THE CASE

This case involves the constitutionality of N.J.S.A. 2C:34-7c, which amended New Jersey law to prohibit sexually oriented businesses in that state from displaying more than two exterior signs. Those signs are further limited to one sign giving notice that the premises are off limits to minors, and one identification[1] sign a maximum of 40 square

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[1]The term "identification sign" is not statutorily defined.

feet in size. A violation of this statute is punishable as a crime of the fourth degree (N.J.S.A. 2C:34-7d).

Petitioners, retail establishments in the State of New Jersey which operate bookstores or video stores selling non-obscene, sexually-oriented material, commenced this action in the State Superior Court seeking declaratory and permanent injunctive relief against enforcement of the exterior sign law. Petitioners challenged said restrictions, inter alia, as violating their freedom of speech rights under the First and Fourteenth Amendments to the United States Constitution, as well as the corresponding provisions of the New Jersey Constitution (A-103 to A-115).

The Superior Court, Law Division, while reviewing both federal and state precedents, decided that the subject statute was unconstitutional under Article I, paragraph 6 of the New Jersey Constitution. The court held that N.J.S.A. 2C:34-7c proscribed all messages except identification and exclusion of minors. It was therefore content-based and presumptively unconstitutional; the state failed to demonstrate a compelling interest for its enactment or that the law was narrowly tailored (A-102). Moreover, there were insufficient findings in the legislative history to demonstrate that signs at sexually oriented businesses pose a significant traffic hazard or concerned the health and welfare of minors (A-97 to A-

98). The state was permanently enjoined from enforcement thereof (A-82).

The Appellate Division of the Superior Court of New Jersey [the "Appellate Division"] reversed, holding that N.J.S.A. 2C:34-7c applied only to "commercial speech," and "passed constitutional muster" (A-67) under the intermediate scrutiny standard. For the first time on appeal the state, over petitioners' objection, introduced the legislative history of a sister statute (N.J.S.A. 2C:33-12.2) concerning protected secondary effects of adult businesses (A-21). The term "identification sign" was construed to allow not only the business' name, but the street number, telephone number, operating hours and general nature of the business as well, and therefore was held not to be vague (A-79).

The New Jersey Supreme Court granted certification of petitioners' appeal, and affirmed. That court ruled that N.J.S.A. 2C:34-7c was content-neutral (A-13), and upheld it as a valid restriction on commercial speech under this Court's intermediate scrutiny standard[2] (A-8 to A-32). On the state's request, the court below took judicial notice of the legislative history of the sister statute N.J.S.A. 2C:33-12.2, although it was not before the trial court (A-21). Moreover,

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[2]Central Hudson Gas & Elec. Corp. v. Public Service Com'n, 447 U.S. 557 (1980).

the State Supreme Court accepted the Appellate Division's "judicial surgery" on N.J.S.A. 2C:34-7c in construing "identification sign" to allow additional information besides the name of the establishment (A-32 to A-34), and thus to uphold it against petitioners' vagueness challenge (A-37 to A-38).

Following that decision, the New Jersey Supreme Court denied petitioners' motion for reconsideration (A-1).

REASONS FOR GRANTING CERTIORARI

POINT I

THE SUBJECT NEW JERSEY STATUTE IS A CONTENT-BASED RESTRICTION ON SPEECH AND SHOULD BE STRUCK DOWN UNDER STRICT SCRUTINY ANALYSIS.

The trial court held that the subject statute, N.J.S.A. 2C:34-7c, is a content-based restriction on speech, invalid under strict scrutiny analysis (A-94, 102). However, the Appellate Division reversed, finding the statute to involve only commercial speech, and therefore not subject to strict scrutiny; it was held to satisfy the intermediate scrutiny standard (A-66 to A-67). The New Jersey Supreme Court affirmed, similarly applying the intermediate scrutiny test for commercial speech (A-13), and upholding the statute under

the First Amendment (A-42). Significantly, both appellate courts relied upon the legislative history of a sister statute which the state had not introduced before the trial court (A-21). As a result, petitioners were denied the ability to challenge or refute the accuracy or applicability of that legislative history.

It is settled law that indecent, non-obscene sexual expression is protected by the First Amendment, Reno v. American Civil Liberties Union, -- U.S. --, 117 S.Ct. 2329, 2346 (1997), and that the First Amendment was made applicable to the states by the Fourteenth Amendment, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996). Thus, the adult businesses at which the New Jersey restrictions are aimed come within the ambit of protected expression.

It is also well-established that governmental regulations which burden speech based upon the content of their expression are presumptively invalid and may survive constitutional challenge only if they promote a compelling state interest and employ the least restrictive means to further the articulated interests. See, Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989). This Court has specifically stated: "Our precedents ... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech

because of its content. (Citations omitted)." Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 642 (1994).

In determining whether a particular regulation is content-based, the government's purpose is the controlling consideration. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). However, the government's mere assertion of a content-neutral purpose is not enough to save a statute which, on its face, discriminates based upon content of speech. Turner Broadcasting, supra, 512 U.S. at 642. Furthier, it is the State of New Jersey which must bear the burden of proving that these requirements have been met in order to justify burdening free speech. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986); Phillips v. Borough of Keyport, 107 F.3d 164, 173 (3d Cir.), cert. denied, -- U.S. --, 118 S.Ct. 336 (1997).

Here, it is beyond dispute that on its face, N.J.S.A. 2C:34-7c applies only to "sexually oriented businesses." If that statute were truly content-neutral, it would be applicable to exterior signs located upon any New Jersey business establishment, rather than only those signs located at "adult" establishments.

The state may argue that the statute is content-neutral, because it is aimed primarily at the adverse secondary effects on surrounding neighborhoods allegedly caused by sexually

oriented businesses, such as increased crime and decreased property values, rather than the content of the speech which is being regulated. This was the rationale of the New Jersey Supreme Court (A-13). If content-neutral, the statute could then be reviewed under the lesser "time, place and manner" standard.

The seminal authority for that proposition is City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-49 (1986) [upholding city zoning ordinance regulating location of movie theaters showing adult films based on expected secondary effects]. However, Renton is inapposite herein. In Renton, the city placed a locational restriction on where a sexually-oriented business could engage in speech. However, the city did not attempt to regulate the specific content of that speech. Here, on the contrary, the State has regulated the petitioners' message. They are limited to two exterior signs, one of which is to inform minors that they are unwelcome on the premises, while the other is limited to "identification," and a maximum size of 40 square feet. Thus, unlike Renton, the content of petitioners' speech is directly restricted.

In Renton, this Court upheld the city's requisite showing of a substantial government interest in its restrictions on speech by its pre-enactment reliance on studies produced

by the City of Seattle showing the harmful secondary effects of adult uses, as well as other "detailed findings" (475 U.S. at 50-51). This Court wrote:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. (475 U.S. at 51-52)

Thus, Renton clearly required the legislature to rely on some evidence before enacting the restrictions. Circuit courts have followed this mandate. See, e.g., National Amusements, Inc. v. Dedham, 43 F.3d 731, 742 (1st Cir.) [Legislature may rely upon "relevant" pre-enactment evidence], cert. denied, 515 U.S. 1103 (1995); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988) [Insisting on legislature's pre-enactment "objective evidence of purpose -- a study or findings"], cert. denied, 489 U.S. 1052 (1989).[3]

However, some courts have diluted the requirements that this Court set forth in Renton, allowing a government to first demonstrate factual evidence of purpose in a trial court

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[3]Accord, Tollis, Inc. v. San Bernadino County, 827 F.2d 1329, 1333 (9th Cir. 1987) [Requiring County to show in enacting restrictions on adult theater it relied upon evidence of harmful secondary effects].

when the subject statute is challenged. In Mitchell v. Com'n on Adult Entertainment Establishments, 10 F.3d 123 (3d Cir. 1993), the court sustained restrictions on adult stores based on both pre-enactment and trial court evidence. The court expressly declined to decide whether the doctrine of "legislative notice" could allow a statute to "pass without any pre-enactment evidence of need and purpose" (10 F.3d at 136).

More recently, in Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) (en banc), cert. denied, ___ U.S. ___, 118 S.Ct. 336 (1997), the Third Circuit held that a lawful basis for a substantial government interest could be established in the trial court upon a statutory challenge without the need for a proper legislative record. The court declared that Renton did not require pre-enactment evidence of secondary effects (107 F.3d at 178). Thus, a conflict exists among the circuits which may only be resolved by this Court.

Petitioners submit that the state should be required to satisfy the pre-enactment evidence rule set forth in Renton. However, even if allowed to adduce additional evidence of studies at trial, here the state did not place any such studies in the record; "nor is there evidence that lawmakers relied on such studies" (A-17). Instead, in upholding the statute, the State Supreme Court cited three sources of the state's

purported substantial interest in regulating the signs of sexually oriented businesses (A-19). None of them, however, are sufficient.

First is a position report to the legislature by the Concerned Women for America. However, the State Supreme Court conceded that said report does not mention signage, or address traffic safety or harm to minors. Rather, it focuses on the herein irrelevant connection between sexually explicit material and violent crimes (A-20).

Second, the State Supreme Court referred to a floor speech by Assemblywoman Crecco, the bill's sponsor (A-20). This attempted justification is contrary to Renton's caution against reliance upon the statements of individual legislators as evidence of legislative intent (475 U.S. at 48). The text of the Crecco speech is contained in the dissenting opinion of Judge Stein. Only two of Crecco's statements have any relevance herein. These are:

> Sign restrictions would be advantageous because multiple signs distract motorists and cause accidents.
>
> * * *
>
> We need to put the brakes on these sorts of element [sic] in all municipalities in the State of New Jersey. Parents are concerned about their children being exposed to these types of

> perverted establishments and their sordid activities. (A-56)

The majority concedes that Crecco offered no evidentiary support for her contention (A-20). However, as noted by the dissent, the second statement about "perverted establishments" is clearly aimed at regulating content rather than controlling secondary effects (A-56).

Third, and in violation of normal appellate procedures, the state was surprisingly allowed to add to its meager trial court record by first introducing in the Appellate Division the legislative history of a separate statute, N.J.S.A. 2C:33-12.2, regulating adult businesses with private viewing booths (A-21). The State Supreme Court then took judicial notice of that statute's legislative history (A-21). The alleged purpose of that history was to show the state's interest in regulating the secondary effects of certain sexually oriented businesses (A-21). However, the dissent notes that the legislative history of 2C:33-12.2 does not demonstrate that the subject signage statute, 2C:34-7c, advances the state interest in traffic safety or protecting minors (A-58).[4]

In finding that the legislature enacted its sign restrictions on adult businesses with knowledge of the

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[4]It is conceded that no history exists to explain the state's 40 square feet limitation on sign size (A-31).

legislative history of 2C:33-12.2 (A-21), the State Supreme Court made a quantum leap in logic. The history of the latter statute was not included at trial (A-15). There has been no showing of statewide traffic problems or harm to minors created by multiple "identification" signs or signs exceeding 40 square feet at adult businesses. While there is case law allowing a legislature to supplement its pre-enactment showing of a substantial governmental interest at trial, supra, petitioners are unaware of any other authority allowing such a showing to be made for the first time on appeal, contrary to Renton.

The New Jersey Supreme Court found N.J.S.A. 2C:34-7c to be content-neutral, and therefore failed to apply a strict scrutiny analysis (A-13). That ruling should be reversed, and the statute invalidated. At a minimum, this matter should be remanded to the state courts for a proper legal analysis under First Amendment principles.

POINT II

COMMERCIAL SPEECH SHOULD BE ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

In the principal part of its opinion below, the New Jersey Supreme Court purported to apply this Court's current test for commercial speech set forth in Central Hudson Gas

& Elec. Corp. v. Public Service Com'n, 447 U.S. 557 (1980) [A-11]. Under that "intermediate scrutiny" test, the state high court ultimately upheld N.J.S.A. 2C:34-7c (A-42). It is submitted that the intermediate scrutiny test of Central Hudson is no longer viable, and should be overruled in favor of a normal First Amendment analysis applicable to other lawful and non-misleading speech.

Historically, this Court once ruled that commercial speech was outside the protection of the United States Constitution. Valentine v. Chrestensen, 316 U.S. 52 (1942). That ruling did not survive the test of time, and in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) [striking a state statute prohibiting advertising of prescription drug prices], it was held that the First Amendment does protect commercial speech. However, that protection was deemed to be of a lesser value than other kinds of speech.

In its well-known Central Hudson decision, 447 U.S. 557, supra, this Court enunciated its current intermediate scrutiny test for commercial speech. Thus, for commercial speech to merit First Amendment protection, it must concern lawful activity and not be misleading. If those criteria are met, to regulate commercial speech the government must show a substantial interest in its restriction; that the regulation directly and materially advances the governmental

interest; and that the regulation is not more extensive than necessary (447 U.S. at 566).

This limited protection test has been controversial, both within and without the Court. For example, in his concurring opinion in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), Justice Blackmun urged the Court to abandon it in favor of full First Amendment protection:

> I hope the Court ultimately will come to abandon Central Hudson's analysis entirely in favor of one that affords full protection for truthful, non-coercive commercial speech about lawful activities. (507 U.S. at 438)

More recently, in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), this Court's last major commercial speech decision produced four separate written opinions, none of them commanding a majority. In that decision striking a restriction on liquor advertising, Justice Thomas flatly stated: "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'non-commercial' speech" (517 U.S. at 522; Thomas, J., concurring).[5]

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[5]Justice Scalia's concurrence expressly shared Justice Thomas' "discomfort" with Central Hudson's intermediate scrutiny test (517 U.S. at 517).

Similarly, Justice Stevens, writing for himself and Justices Kennedy and Ginsburg, indicated that bans on "truthful non-commercial commercial speech ... usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." (517 U.S. at 503).

Various commentators and lower courts have similarly written. In his well-known article on the subject, Ninth Circuit Judge Alex Kozinski urged in "Who's Afraid of Commercial Speech," 76 Virginia Law Review 627 (1990), that the commercial speech doctrine be discarded. Judge Kozinski wrote:

> If we treat speech as speech, commercial or not, we fall back on standard content-neutral analysis: Government regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on expression is no greater than necessary. (76 Virginia Law Review at 651)

Accord, Walsh, Brody & DeVore, "'Central Hudson' Test: a Failed Promise," 22 New York Law Journal 2 (August 13, 1998) [urging full First Amendment protection for lawful non-misleading commercial speech; finding it "astonishing" that commercial speech is less protected than the "rantings of neo-Nazis" in Skokie].

A recent lower court opinion also raises this issue. In United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998), the court declared:

> The current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between commercial and non-commercial speech. (Citations omitted). (146 F.3d at 1136)[6]

There is no convincing rationale for treating commercial speech as the "stepchild" of protected free expression. Moreover, the distinction affords government a tool to abridge unpopular speech on the basis of being pigeonholed as "commercial"; certainly the potential for abuse is readily apparent. This Court is requested to grant certiorari in this case to guide the lower courts, and to declare that commercial speech is no longer to be considered a disfavored form of protected expression under the First Amendment.

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[6] Cf. dissenting opinion of Chief Judge Politz in Greater New Orleans Broadcasting Ass'n v. United States, 149 F.3d 334, 341 (5th Cir.) [urging the Court to provide guidance in the constitutional review of commercial speech], petition for cert. filed, 67 U.S.L.W. 3177 (U.S. Sept. 2, 1998) (No. 98-387).

POINT III

THE NEW JERSEY STATUTE FAILS TO SATISFY THE LESSER "INTERMEDIATE SCRUTINY" LEVEL OF FIRST AMENDMENT PROTECTION.

If this Court should decline to revisit the theoretical underpinnings of commercial speech protection, then the analysis first set forth in Central Hudson Gas & Elec. Corp. v. Public Service Com'n, 447 U.S. 557 (1980), would continue to govern. That decision articulated a multi-factor "intermediate scrutiny"[7] test to determine whether a governmental regulation of commercial speech satisfies the First Amendment:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. (447 U.S. at 566)

The subject statute cannot survive this analysis.

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[7]Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

As to the first factor, the New Jersey Supreme Court conceded that petitioners' advertising is not misleading, and does not involve unlawful activity or obscenity (A-14 to A-15). Thus, petitioners pass the threshold test; their speech is entitled to First Amendment protection. (Id.).

The second Central Hudson prong requires the state to demonstrate a "substantial interest" in support of its regulation of commercial speech, with the government having the burden of proving that interest. Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995). Moreover, unlike the lesser rational basis standard, Central Hudson does not allow a court to "supplant the precise interests put forth by the state with other supposition." Edenfield v. Fane, 507 U.S. 761, 768 (1993). Thus, it will not suffice "if the stated interests are not the actual interests." (Id.).

At the trial court level, the state asserted that the signage restrictions of N.J.S.A. 2C:34-7c served the interests of traffic safety and the welfare of minors (A-15). On appeal, however, the state was allowed to introduce the legislative history of N.J.S.A. 2C:33-12.2 as to purported secondary effects of adult businesses (A-21). Nevertheless, as discussed in Point I, supra, the state has failed to satisfy its burden of demonstrating in the legislative or trial record a substantial interest in restricting petitioners' commercial speech.

The third Central Hudson prong is whether the restriction on commercial speech directly advances the government's asserted interests. As stated in Edenfield v. Fane, 507 U.S. 761 (1993), the government's burden cannot be satisfied by mere surmise or conjecture. Rather, the state must prove that "the harms it recites are real and that its restrictions will in fact alleviate them to a material degree" (507 U.S. at 771).

Here, the state has wholly failed to demonstrate that its restrictions on the signage of sexually oriented businesses will control the purported secondary effects thereof. The State Supreme Court's reference to Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), for the proposition that increased traffic safety could be achieved by limiting advertising signs (A-25) is spurious. If that were the state's true purpose, it would limit signage on all businesses, not just sexually oriented businesses. See, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) [striking ordinance where alleged secondary effects of newsracks with commercial handbills were no worse than newsracks with newspapers]; United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998) [striking statute under Central Hudson test where numerous exceptions to restrictions resulted in ineffective support for government's purpose].

The final Central Hudson prong is whether the government regulation of commercial speech goes too far and is more extensive than necessary to serve the state's asserted interests in the regulation.

This Court now requires "a 'fit' between the legislature's ends and the means chosen to accomplish those ends ...." Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995). Moreover, the great deference which this Court formerly accorded to a state's legislative determination that its restrictions on commercial speech would be effective without unduly burdening speech[8] is no longer good law. As set forth in Justice O'Connor's concurrence in 44 Liquormart, Inc. v. United States, 517 U.S. 484 (1996):

> The closer look that we have required since Posadas comports better with the purpose of the analysis set out in Central Hudson, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored. (517 U.S. at 531-32; O'Connor, J., concurring)

Here, N.J.S.A. 2C:34-7c is not narrowly tailored. It attempts to regulate statewide what is clearly a local issue -- signage on a business. Such signs present problems, if at all, to municipalities, and do not require a statewide solution.

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[8]E.g., Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 341-44 (1986).

Nor has the state offered any evidence to justify legislation on so broad a scale.

Certainly a small village in New Jersey may have traffic problems -- as well as alleged potential secondary effects -- of a different kind and magnitude than the Atlantic City gambling casino area. Municipal limitations on signs in the former case may well be reasonable. However, adult businesses in the latter area must compete with other purveyors of entertainment and their extensive advertising. To enact a statewide limitation on the signage of sexually-oriented businesses is unjustified by legitimate First Amendment concerns.

This is particularly seen in the limitation on the size of a single identification sign to 40 square feet, which even the State Supreme court agreed had no legislative history (A-31). The Court's rationale for approving that size limitation was based on "legislative discretion" (A-31). However, as set forth above, at least since 44 Liquormart such deference to the legislature is no longer authorized in the commercial speech area.

The state has failed to meet its burden of demonstrating that its restrictions on speech are no more extensive than necessary.

POINT IV

THE NEW JERSEY STATUTE IS UNCONSTITUTIONALLY VAGUE.

The trial court held that N.J.S.A. 2C:34-7c was void for vagueness, based on the fact that the word "identification" could mean more than name only (A-101). Subsequently, the Appellate Division's attempt to salvage the instant constitutionally infirm statute -- by "narrowly" construing it to permit "identification" signs which may relate information pertaining to the "general nature of the establishment in order to identify the business," and "temporary" political signs (A-78 to A-79) -- has exacerbated rather than alleviated its unconstitutional vagueness. The Supreme Court of New Jersey held that the statute as construed is sufficiently clear and gives adequate notice to sexually oriented businesses to withstand this pre-enforcement challenge (A-37). For the reasons set forth below, the Supreme Court of New Jersey's holding was erroneous and should be reversed.

A law is unconstitutional if its provisions are so vague and imprecise that persons of ordinary intelligence must guess at its meaning and differ as to its application. Coates v. Cincinnati, 402 U.S. 611, 614 (1971). This rule stems from the theory that an average person must be given a

"reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." Grayned v. Rockford, 408 U.S. 104, 108 (1972). Of tantamount importance is the prevention of arbitrary and discriminatory enforcement; to prevent this, laws must provide explicit standards for those who apply them. Grayned, supra.

Moreover, when a vague statute touches protected First Amendment expression, as in the instant case, the vagueness doctrine "demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974). Here, the Appellate Division interpreted the term "identification" to include information relating to the "general nature of the business" (A-79), but neither the statute nor the court's decision defines that phrase.

The Supreme Court of New Jersey also failed to define the term "identification," or the phrase "general nature of the business." In attempting to interpret the latter, that court held that the phrase allows an establishment to advertise that it is a sexually oriented business and that it sells such products to adults (A-38). However, if the court's construction of the statute is to be read as having any meaning, then some types of information are not permitted to appear on "identification" signs, such as information which is "specific" or communicates information pertaining

to the "specific nature of the establishment." Nevertheless, the court offered absolutely no guidance as to whether "identification" signs may contain pictures, drawings or "specific" terms such as the product lines which are sold (e.g., types of books, magazines and/or videotapes).

Similarly, the State Supreme Court attempted to define "temporary political sign," since the Appellate Division had failed to specify the length of time that a posting is deemed to be "temporary," or to interpret "political sign." The court held that a person of average intelligence would understand "temporary political signs" to include signs that are "not permanently affixed to the establishment's property," and that "speak to matters relating to the activities of the government, a politician, a political party or a political issue" (A-38). However, the court still failed to specify the length of time that a posting is deemed to be "temporary" as opposed to permanent (e.g., one day, week, month and/or year), or to adequately describe the meaning of "temporary political sign."

The state court's ambiguous interpretation of the statute runs afoul of the requirement that persons of ordinary intelligence may not be made to guess at the meaning of the statutes, especially those with penal sanctions. Coates v. Cincinnati, 402 U.S. 611 (1971). Consequently, N.J.S.A. 2C:34-7c lacks the precision that the First Amendment

requires when a statute regulates the content of speech. The lack of objective standards places petitioners and other citizens in the position of not knowing what speech is proscribed by this statute, creating a chilling effect on free speech. In addition, since the statute calls for criminal sanctions, the fear of punishment may cause speakers to remain silent rather than communicate even arguably unlawful words, ideas and images. Reno v. American Civil Liberties Union, ___ U.S. ___, 117 S.Ct. 2329, 2332 (1997).

By failing to provide citizens or law enforcement officials with sufficient guidance in determining what types of information may be communicated upon "identification" signs, the New Jersey Supreme Court has effectively authorized every law enforcement officer in the state to act as a *de facto* legislator. Each officer may determine what types of information may be included on signs on an *ad hoc* basis, thereby depriving the individual against whom the law is enforced of reasonable notice of the scope of the application of the law, as well as creating the potential for erratic enforcement. For example, if a law enforcement official has a personal dislike of adult businesses, he may determine that a sign which states that the store sells "magazines, books and videotapes" is too specific in nature. A different law enforcement officer, however, may conclude

that such signs are sufficiently general in nature because they do not include titles or product lines.

Thus, each store's employees, managers and owners must correctly anticipate, under pain of arrest, the interpretation of the statute which will be made by every law enforcement officer. Similarly, each officer is free to determine his or her own definition of a "temporary political sign." One law enforcement officer may be offended by signs which state: "make love, not war," "condoms are cool," or "sex is good, not bad," and decide that they do not constitute "political" speech and are, therefore, prohibited by the statute. Further, even if the officer deems the sign to be "political," he can arbitrarily determine how long it can be posted before he decides that it is no longer "temporary." In Smith v. Goguen, 415 U.S. 566, 575 (1974), this Court specifically warned against statutes which permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Clearly, under the interpretation offered by the New Jersey Supreme Court, law enforcement officials are permitted to interpret and enforce the statute at their whim. Such arbitrary power cannot be tolerated in the First Amendment arena, especially when penal sanctions apply. Therefore, N.J.S.A. 2C:34-7c, must be declared void for vagueness.

CONCLUSION

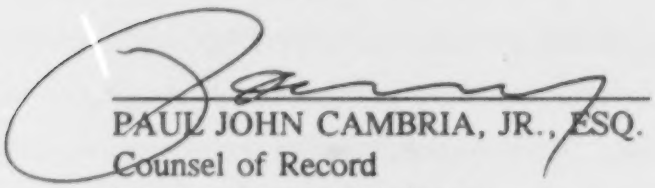
This Court should not tolerate the New Jersey appellate courts' attempts to eviscerate the Renton requirement that a government attempting to regulate speech must have pre-enactment evidence in support of the constitutionality of its actions.

This Court is urged to reconsider the unsettled state of the law concerning the legal test for restrictions on so-called commercial speech, and to eliminate the distinction between it and other forms of speech. In short, content-based restrictions on commercial speech should be presumptively invalid, as they are for other forms of protected speech. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

If this Court declines to re-examine this area, it should nevertheless strike the subject statute under the intermediate scrutiny test of Central Hudson, and the vagueness doctrine.

For the reasons set forth herein, petitioners respectfully request this Court to grant their petition for certiorari.

Respectfully submitted,



PAUL JOHN CAMBRIA, JR., ESQ.
Counsel of Record
Lipsitz, Green, Fahringer,
Roll, Salisbury & Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-33857
(716) 849-1333

BARRY NELSON COVERT, ESQ.
WILLIAM M. FEIGENBAUM, ESQ.
of Counsel